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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1187

HONORABLE JOHN F. DOOLING, JR., UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK,

—v.—

UNITED STATES OF AMERICA,

Respondent.

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, HUGH McINTOSH,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—v.—

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on the 21st day of January, 1969.

Citations to Opinions Below

The proposed memorandum and order of the District Court (Dooling, J.) dated October 11, 1968, before which

Court the indictment herein was tried, is unreported and is printed as Appendix A hereto. The opinion of the Court of Appeals has not yet been reported and is set forth as Appendix B hereto. The memorandum and order of the District Court (Weinstein, J.) denying defendants' motion to dismiss the indictment is unreported and is set forth as Appendix C hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on the 21st day of January, 1969. Thereafter, the Court of Appeals denied a stay of mandate but on March 5, 1969, Mr. Justice Harlan of this Court stayed the mandate of the Court of Appeals conditioned upon the filing of a petition for certiorari on or before March 22, 1969. The jurisdiction of this Court is invoked under Section 1254, para. 1 of Title 28 of the United States Code.

Questions Presented

1. Did the Court of Appeals have the power to mandamus the District Court judge to enter judgment and to impose sentence in the face of the District Court's fixed and written intention to dismiss the indictment, based by the District Court on the ground that "to enter judgments of conviction against the defendants would be to deny them due process"?

2. Should this Court permit the Court of Appeals through its mandamus power to abort a proposed final determination in the District Court, from which determination there could have been no appeal by the government,

thereby conferring upon the government an appellate-like review to which it was not otherwise entitled?

3. Does a United States District Judge have power, after his own due deliberation, to dismiss an indictment after verdict, where he conscientiously concludes that such relief is constitutionally mandated?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses is his favor, and to have the Assistance of Counsel for his defence.

Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> (b) . . . If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Statement

The petitioners herein, who are defendants under a truck hijacking indictment in the United States District Court of the Eastern District of New York, were indicted in April of 1960. Their first trial ended in a jury disagreement as to all defendants in May 1961. The second trial, which took place less than a month later in June of 1961, ended in judgments of conviction which were reversed by the Court of Appeals for the Second Circuit (305 Fed. 2d 534) in July 1962. The third trial, begun in May 1963, resulted in a mistrial as to some of the defendants and a jury disagreement as to the remainder. The fourth trial, which lasted from January to April of 1964, resulted in a conviction which was again reversed by the Court of Appeals for the Second Circuit (349 Fed. 2d 6) in July 1965.

Subsequent to this 1965 reversal, the case appeared on the District Court calendar only irregularly and on some occasions was off the calendar for as long as six and fourteen months at a time. Finally, in September 1967, the case was fairly regularly calendared for purposes of trial, and all counsel were instructed to be available to proceed to trial.

In October 1967, the defendants moved to dismiss the indictment urging as grounds for this relief the claim that they had been denied their right to a speedy retrial after the July 1965 reversal of their convictions. They also contended that the multiplicity of retrials constituted proof of recurrent jeopardy, cruel and inhuman punishment, and a denial of due process. The motions of the defendants were denied by District Judge Weinstein (see Appendix C) with leave to renew the speedy trial motion before the trial judge.

Defendants' last trial herein was actually begun in April 1968 and concluded approximately five weeks later in verdicts of guilty as against all defendants except La Fante who was acquitted. The trial court (DOOLING, J.) entertained motions for post-verdict relief, without any objection by the government as to their timeliness or the court's power to grant any of the relief sought, and on October 11, 1968, distributed to all counsel a written memorandum and order embodying his proposed intention to dismiss the indictment. (A copy of that proposed memorandum and order is annexed to this petition as Appendix A.) The trial court deferred signing and filing the proposed memorandum and order upon the explicit request made by the government that it be given some additional time to make proposals regardnig the ultimate form of the proposed order, in an effort to ensure, if possible, a right of appeal by the government from the projected disposition with which it was then squarely faced. An adjournment for this limited purpose was allowed. During the time so allotted, however, the government applied to the United States Court of Appeals for an extraordinary remedy in the nature of mandamus and prohibition to restrain Judge Dooling from dis-

missing the indictment and to require him to impose sentence. On January 21, 1969, the Court of Appeals for the Second Circuit decided to grant such relief. (A copy of the opinion of the Court of Appeals is annexed hereto as Appendix B.)

The Proposed Memorandum and Order of Judge Dooling

Judge Dooling's proposed Memorandum and Order first takes up, after treating with a brief statement of the motions before him and a history of the case, the pre-trial motion to dismiss on retrial delay, double jeopardy, due process, and cruel and unusual punishment grounds, which Judge Weinstein denied with leave to renew, in part, at the trial. The 1965 reversal by the Court of Appeals (349 F. 2d 6) was treated as leaving to the new trial court the propriety of a new trial on the basis of the circumstances existing at the time of the new trial. Judge Dooling then turned to the problems created by the calling of the surprise witness Valachi, and concluded that the government had the right to call him. Judge Dooling was plainly troubled that no prior consistent statement was ever produced and entertained grave doubts as to the truthfulness of his testimony:

> "No prior consistent statement was ever produced, and fabrication remained a lively suspicion to the end, given Valachi's background, his record and his determined negotiation of better living conditions as the price for his agreeing to testify."

The opinion then goes on to discuss the question of the difficulty which arose as the result of Valachi's being called as a surprise witness, and the possibility of sequestering

or examining the jury on the voir dire as ameliorative measures. The publicity which did ensue Judge Dooling found by legal standards to be prejudicial, and such that ". . . many judges would unhesitatingly have declared a mistrial, and would now set aside the verdict." The trial court goes one, however, to conclude that on the basis of the narrowness of the issue before them and the jurors' answers, an overturning of the verdict on this ground was not required, and then turns to the *Bruton* arguments made about Valachi's testimony and rejects them. A limitation of cross examination point is discussed and resolved against the defendants, the excuse of a juror is found harmless, and challenges to the grand and petit juries are rejected. The court then goes on to assess the overall fairness of the trial and after suggesting that defense counsel often endeavored to make much of little in terms of the fairness of the trial as it progressed, concludes that ". . . the elements of basic unfairness were present in the fearful terms on which Vaccaro's evidence was obtained, and in the unlovely bargaining with Valachi for his testimony."

The testimony of another witness as to the location of the truck at the critical moment left the court with ". . . more than a disturbing doubt . . . that it was not fairly presented." The prosecutor's summation is condemned as having ". . . needlessly transgressed allowable limits at several points. . . ." The court then turns to the question of whether the indictment can stand in light of Judge Weinstein's pre-trial opinion. The court then discusses the specific loss of witnesses and finds that contention unimpressive, but goes on to note that testimony in the fifth trial had become a feat of recollecting earlier testimony rather than fact. Thus, Judge Dooling states:

"Testimony, in such a setting is arguably a feat in recalling earlier testimony rather than the facts; consistency not truth arguably becomes the testimonial goal.

"After remand, nothing occurred in the case for six months. After some desultory proceedings in January, on one date in March, and on three dates in April 1966, again nothing occurred until June 2, 1967. Starting in June 1967 a number of matters relating to bail and the assignment of counsel were dealt with and the case was put over until September 1967. Again in September 1967 matters relating to the assignment of counsel and to bail came up, the trial was twice postponed, and on October 9, 1967, it was marked ready and passed. On October 26, 1967, the first motion to dismiss was filed. The delay from the date until the trial commenced cannot be considered to any degree avoidable, given the fact that there were five separately represented defendants, all busy in the Courts, two of them new to the case, and two of them assigned counsel. The critical time lapses after affirmance were not justified and were not occasioned by acts of the defendants. Their result has been that a case in which the statute of limitations would have expired in 1964 was tried, and for the fifth time, nearly four years later, in 1968."

The trial court concludes this careful discussion of the delays in bringing the defendants to trial after the last reversal, and comes to its ineluctable determination:

"It is concluded that the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limita-

tions upon the governmental rights of retrial and orderly deliberateness in seeking retrial. *Cf. Ross* v. *United States,* D.C. Cir. 1965, 349 F. 2d 210; *Hardy* v. *United States,* D.C. Cir. 1967, 381 F 2d 941, 948 fn. 35; *United States* v. *Parrott,* D.C.D. 1965, 248 F. Supp. 196. Note *Petition of Provoo,* D.Md. 1954, 17 F.R.D. 184, aff'd. 1955, 350 U.S. 857. It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process."

Judge Weinstein's Opinion

Judge Weinstein's perfunctory pre-trial memorandum and order undertook no detailed examination of the varying contentions made before him by counsel. While he explicitly described as "disturbing" the two and 'one-half years' delay in bringing on the present reprosecution after the last reversal, he declined to go beyond this threshold determination and referred to the trial judge, on defendants' application, an assessment of the consequences of this delay within the context of the trial as it was to unfold, and as the case in its total history would ultimately appear to the trial court. Thus, Judge Weinstein wrote:

> "The motion to dismiss is denied with leave to renew *it* at the trial." (Emphasis added)

The Unprecedented Opinion of the Court of Appeals

An examination of the opinion of the Court of Appeals demonstrates that it rested its decision to abort Judge Dooling's intention to vindicate the defendants' constitutional rights by dismissing the indictment on a variety of grounds which were neither consistent nor individually sustainable or sound.

At the outset, it should be noted that the Court of Appeals itself has observed that the issue in this case was "novel" and represented a "first example" of its kind.

Though the grounds urged by the government for granting mandamus rested upon its construction of Rule 48(b) of the Federal Rules of Criminal Procedure, the Court of Appeals concluded that Judge Dooling "does not regard Rule 48(b) as authorizing the dismissal of this indictment." This unsupportable conclusion on the part of the Court of Appeals flies in the face of clear language on the part of Judge Dooling, as well as the Rule 48(b) cases relied upon by him in his proposed order, which show that the speedy trial strictures of both the Constitution and the Federal Rules of Criminal Procedure were central to his thinking. It is enough to point out that both Judge Dooling and the Court of Appeals specifically cite *Pollard* v. *United States*, 352 U.S. 354 (1957) in reaching their respective, albeit opposed, conclusions. The Court of Appeals concludes, however, that Judge Dooling could not have been relying on Rule 48(b) because he found the specific claims of prejudice made by the defendants in their post-trial motions "unimpressive." Judge Dooling's keenly refined discussion, assessing as it does, all the circumstances, discerned a real and pervasive prejudice flowing from the delay in

retrial which could only have been recognized and assayed by the trial judge after a measured consideration of the trial as its varied events were played out before him against the background of charges which were then being tried for the fifth time, and four years after the statute of limitations would have expired. Judge Dooling's analysis of the issue of trial delay was extended, acute, and, as he put it, on a level reaching beyond the mere "*specific* instances of disadvantage" relating to delay which, in the terms put by defense counsel, he found to be "not impressive" (emphasis added). His own expression of the delay problem, suffused as it was by perceptions visible only from his own vantage point as trial judge, transformed relatively limited arguments of counsel pitched primarily to the last trial in its mere "immediate setting," into a cohesive, fully relational and transcending presentation of error. So it was that Judge Dooling, who found counsel's arguments "not impressive" when considered solely on the "basis of matters intrinsic to the trial and *its immediate setting*", but compelling and evocative when viewed "in the light of the trial considered *in its entirety* on the grounds urged before Judge Weinstein and reserved by him for reconsideration at trial time" (emphasis added). From this commanding overview of the "trial" as an "entirety", whose horizons Judge Dooling could now see as reaching from the first trial through the last, he discerned completely expressable instances of injury contradicting the Court of Appeals' unfounded assertion that the trial judge's opinion was void of "any findings" and distinguished "only by conclusions stated in general terms."

Specifically, Judge Dooling was troubled that the gap of four years between the testimony of the trucking company

employee Gehring in the fourth and fifth trials "impaired counsel's opportunity to cross-examine him in the most effective manner," noting as well that the incident concerning which he testified has occurred nine years earlier. These facts gave rise to the trial judge's telling, and most pertinent, observation that "Testimony, in such a setting is arguably a feat in recalling earlier testimony rather than facts; consistency not truth arguably becomes the testimonial goal."

Turning then directly to the issue of delay attributable to the government, Judge Dooling effectively underscored the pre-trial judgment of Judge Weinstein to the effect that blame for delay was, indeed, the government's. The Gehring dilemma, accordingly, was one authored by the government. And, said Judge Dooling, the "critical time lapses after affirmance [in 1965] were not occasioned by the acts of the defendants."

Prior to its assessment of the Gehring and delay features of the case, Judge Dooling had recounted a number of instances of error proposed by counsel which he found unavailing purely in terms of their value as seen within the limits of the fifth trial by itself. The trial court by no means, however, sytled these claimed errors as unavailing when considered in the light of the five trials together and the need to provide the defendants not merely a fair trial, but a fair "retrial." This feature of Judge Dooling's opinion is completely lost to the Court of Appeals. Judge Dooling's appreciation of the delay in *retrial* issue entailed an explicit recognition that occurrences unoffending in terms of the fifth trial alone might not escape notice when viewed across the entire history of the case. His early comments regarding Valachi, jury sequestration, jury contamination

by publicity, Vaccaro, Gehring, testimony by rote, the prosecutor's summation and the merely marginal fairness of the trial, all as set forth above, were, accordingly, not out of the case insofar as the issue of delay and a fair *retrial,* were concerned. On this subject, the trial court fashioned a possibly unique, but nonetheless powerful due process argument in which simple preconceptions regarding the delay cases were not truly appropriate. Herein lies the luminous truth of the Dooling opinion as it traces out a broadened shadow of error; the delay consideration shining first against the derelict but instructive bodies of trials gone by, thereby casting a clear penumbra of fault as expansive as the intervening masses beyond which its light had to pass.

It is clear, therefore, that Judge Dooling predicated his decision to dismiss the indictment herein upon a meld of considerations; all of them identifiable, all of them specifically enumerated by the trial court in one context or another, and all of them drawn together explicitly and by inference as the proposed memorandum reaches it unavoidable and conscience-commanded conclusion that judgment in this case should not be—and never should be—entered. For the Court of Appeals to urge that Judge Dooling's opinion is bereft of Rule 48(b) considerations, the question of delay, and the discussed instances of trial fault seen as offending when viewed in terms of several retrials, is to misapprehend totally a legal writing evidencing profound intelligence and conceptual sensitivity. When once this point is recognized, the remaining random struts and supports thrown up by the Court of Appeals in defense of its decision are very easily swept aside.

What appears to be the starting point of the Court of Appeals opinion is the argument that Judge Dooling was necessarily precluded from taking an overview of the five trials and could decide the issue of delay only in terms of "prejudice" and "oppression" demonstrated within the fifth trial itself. The Court of Appeals' conclusion on this score is in no way derived from any explicitly stated stricture appearing in the rather cursory decision entered by Judge Weinstein prior to the last trial. If anything, the Weinstein memorandum simply refers to the trial court the fundamental issue of error predicated upon retrial delay to be weighed by the trial court in a fully operational setting.

Remarkably enough, the Court of Appeals specifically declined to decide whether Judge Dooling had the inherent power to "do justice", although this was actually the central issue of the case. In the course of sidestepping this issue, however, the Court of Appeals did recognize that:

> "Mandamus is an extraordinary remedy, and is appropriate only where there are "exceptional circumstances amounting to a judicial '*usurpation* of power'" (Will v. United States, 389 U. S. 90, 95, 1967 emphasis added).

Nowhere in the Court of Appeals opinion, however, is the reader shown in what way the action proposed by Judge Dooling constituted a "usurpation of power". At most, the Court of Appeals attacks the Dooling opinion because it does not find sufficiently stated therein the explicit circumstances of error and harm upon which they could reach the very same conclusion. As we have already pointed out, this blindness to the factual and legal considerations which prompted Judge Dooling to take the course he did, amounts to little more than a quarrel with the style of the trial

court's expression and resolution of the problem. This unfortunate self-imposed perceptual blocking of what Judge Dooling said is no substitute for a demonstration by the Court of Appeals of the necessary fact of "usurpation". Indeed, the Court of Appeals' opinion is bereft of any such finding and depends wholly upon its own merely generalized and conclusory dissatisfaction with the result reached by Judge Dooling. The words chosen by the Court of Appeals to epitomize its inexplicit displeasure with the Dooling memorandum in no way exposes a "usurpation" capable of triggering its mandamus power. Most revealing on this score is the following excerpt from the Court of Appeals' opinion.

> "Since the Federal Rules provide no basis for the court's proposed action it must find its justification, if any, in the inherent power of a district court 'to do justice' (United States v. Apex Distributing Co., 270 F. 2d 747, 756, 9th Cir., 1959; O'Neal v. United States, 272 F. 2d 412, 413-14, 5th Cir., 1959; see United States v. Health, 260 F. 2d 623, 632, 9th Cir., 1958; United States v. Kane, 243 F. Supp. 746, 725, S. D. N. Y., 1965). But whatever may be the scope of this power, in our view the proposed action of the court is not supported by any findings made in its memorandum, but rather only by conclusions stated in general terms.
>
> "In final analysis his conclusion is not based on any ruling regarding the matters left open by Judge Weinstein, but rather, it would seem, upon the court's own sense of uneasiness because of doubt that the trial has been fair. In such event the proper course for the trial judge would have been to confess his own errors and grant a new trial: it does not lie in his power to put an end to the case by dismissal because of vague and unsubstantiated doubts. The proposed

> action is without precedent, and we believe it would seriously disrupt the prompt and efficient administration of criminal justice."

As a substitute for a showing of "usurpation", the Court of Appeals—as indicated above—amazingly suggests that Judge Dooling should have ordered a new *sixth* trial, thereby compounding and intensifying the very harms which Judge Dooling concluded required final constitutional extirpation by means of a definitive termination of the prosecution. The utter sophistry of the proposal of the Court of Appeals that Judge Dooling should have granted a new trial rather than to finally terminate all prosecution is most clearly revealed in its later comments and heavy reliance upon considerations relating to judicial economy and calendar congestion. In this connection, the Court of Appeals incredibly goes outside of the facts of this case itself to support its "usurpation" argument by observing:

> "We are also of the view that the exercise of our mandamus power is especially appropriate in a case which has already taken a grossly disproportionate amount of trial time in the United States judicial district where the delay in reaching criminal cases for trial is the greatest of any district in the country[2] (see. Administrative Office of the United States Courts, Annual Report of the Director—1968, Table D 3b)."

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[2] "In fairness to the district judges it should be pointed out that two unfilled vacancies in the court for a period of two years prior to the summer of 1968 are the principal reason for the delays in criminal trials. Recent efforts of the judges, under Chief Judge Zavatt, including summer sittings by the active and senior judges, and by visiting judges, have greatly reduced the number of pending indictments, and the time intervals before trial."

Lurking in these comments is the remarkable notion that the constitutional rights of a defendant are to be measured by a less rigorous standard by a Judge sitting in a busy District than his brother presiding in a quieter setting.

The great weight which the Court of Appeals placed upon the fact that Judge Dooling rendered his decision after, rather than before, verdict also requires comment. The Court of Appeals criticism of the action taken by Judge Dooling implies that a District Judge is bound to render a judgment upon complicated questions requiring a survey of extended past proceedings only prior to verdict, if at all. This stricture places the District Judge in the anomolous position of having to shoot from the hip, regardless of consequences, even before he has fairly and fully determined whether the action contemplated is reasonable or lawful. He is placed in the position of having to generate a seasoned appreciation of the facts and law as regards all that has transpired in what amounts to a veritable instant. We are told by the Court of Appeals in effect, that a calm reflection upon events, continuing through and beyond the jury's deliberations if necessary, is not to be suffered. The compelling public policy said to forbid the assumed luxury of thoughtful consideration is never explained. Neither is consideration given to the fact that a jury determination favorable to the defendants could well moot the many questions confronting the mentality of the trial judge. Thus, the value of judicial economy, so emphasized and venerated by the Court of Appeals elsewhere in its opinion is ultimately, albeit silently, dismissed.

Of overriding importance is the fact that the Court of Appeals by its decision and in its opinion undertakes to

overrule *Will* v. *The United States,* 389 US 90 (1967), *sub silentio.* The Court of Appeals says after having cited and discussed *Will*: "accordingly, we hold that in the circumstances of this case the fact that the Government might not have been able to appeal from Judge Dooling's order does not render mandamus inappropriate". This language of the Court of Appeals can be hardly squared with the words of this Court when it wrote:

> "Moreover, 'in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored,' Carroll v United States, 354 U.S. 394, 400 1 L ed 2d 1442, 1447, 77 S. Ct. 1332 (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition, cf. Fong Foo v United States, 369 US 141, 7 L ed 2d 629, 82 S Ct 671 (1962). Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 USC §3731, and the Criminal Appeals Act is strictly construed against the Government's right of appeal, Carroll v United States, 354 US 394, 399-400, 1 L ed 2d 1442, 1446, 77 S Ct 1332 (1957). *Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies.* E.G., Fong Foo v United States, 369 US 141, 7 L ed 2d 629, 82 S Ct 671 (1962); Parr v United States, 351 US 513, 520-521, 100 L ed 1377, 1384, 1385, 76 S Ct 912 (1956); Bank of Columbia v Sweeny, 1 Pet 567, 569, 7 L ed 265, 266 (1828). Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal 'made less compelling . . . by the fact that the Government has no later right to appeal.' DiBella v United States, 369 US 121, 130, 7 L ed 2d 614, 620, 82 S Ct 654 (1962)." *Will* v. *United*

States, 389 US 90, 19 L ed 2d 305, 311 (1967). (Emphasis supplied.)

The brute fact is that the Court of Appeals, formalistic disclaims to the contrary notwithstanding, has undertaken to exercise, under the guise of supervisory powers, a full and detailed appellate review of a particular action proposed to be taken by a District Court judge, found his reasoning not to their liking and accordingly usurpational, and in effect directed a reversal of an order which all parties believed the government could not seek to review by appeal. It hardly needs to be argued that neither the government nor the Court of Appeals would have invoked mandamus if they had thought that Judge Dooling's order was appealable. The key question to be resolved by this Court, therefore, is whether the Court of Appeals could accomplish by the indirection of mandamus what Congress had otherwise put beyond its reach.

Reasons for Granting the Writ

1. The Court of Appeals' mandamus decision is novel and unique.

Rule 19(b) of the Rules of this Court provides that one of the reasons for a grant of certiorari is that a Court of Appeals ". . . has decided an important question of federal law which has not been, but should be, settled by this court. . . ." It is certainly not necessary to labor the novelty of the Court of Appeals decision in this case. The Court of Appeals itself, at the very outset of its opinion, characterizes the question before it "as novel" and concludes by labelling the action taken by Judge Dooling as a "first example of such a dismissal" requiring a "clear and un-

equivocal response'' on its part. A reading of the opinions of the District Court and the Court of Appeals makes the importance of this case, in terms of the administration of Justice throughout the federal courts, manifest. Fundamentally, a District Court, acting after considerable deliberation, has taken non-appealable action to vindicate constitutional rights which in its view, could be served in no other fashion. The Court of Appeals has intervened by the extraordinary device of mandamus and has directed the District Court to pronounce a judgment of conviction in a criminal case, which judgment would violate the District Court's conscientious view of what the Constitution requires by way of justice in this case.

2. The decision of the Court of Appeals is an improper and illegal departure from the accepted, permissible and usual course of judicial procedure.

Rule 19(b) of the Rules of this Court provides that one of the reasons for a grant of certiorari is that a decision of the Court of Appeals has ''so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.'' The conceded novelty of this case arises primarily from the Court of Appeals' determination to intervene as a court of appellate review in the determination of a matter plainly outside of its appellate powers, and to arrogate appellate jurisdiction to itself under the guise of supervision. We think that *Will* v. *United States*, 389 U.S. 90, 1967, forbids any such adventure and does so in consonance with all of the decided cases and in accordance with the fundamental constitutional policy against appeals by the government in criminal cases. In this connection, we respectfully refer the Court to our discussion of the *Will* case, *supra*, pp. 18-19.

Unless this Court grants certiorari, the opinion of the Court of Appeals left undisturbed cannot fail to have a chilling effect upon trial judges throughout the entire federal judiciary. This decision, in effect, instructs the trial judge to grant the government otherwise unavailable appellate review by entering judgments of conviction, even though the judge's conscience and intellect tell him that the Constitution requires an opposite result.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Proposed District Court Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

60 CR 147

UNITED STATES OF AMERICA,

—against—

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, HUGH MCINTOSH,

Defendants.

---

60 CR 147

Appearances:

MAURICE EDELBAUM, ESQ.,
(LAWRENCE K. FEITELL, ESQ., of Counsel),
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ROBERT KASANOF, ESQ.,
for defendant Albanese

FRANCES T. WOLFF, ESQ.,
for defendant Spero

EDMUND A. ROSNER, ESQ.,
for defendant McIntosh

VICTOR C. WOERHEIDE, ESQ., and
ROBERT M. ORNSTEIN, ESQ., Department of Justice,
(JOSEPH P. HOEY, ESQ., United States Attorney,
of Counsel)
for the Government

DOOLING, *D. J.*

The fifth trial of Counts 1 and 2 of the indictment in the present case ended in verdicts of guilty against the four

defendants whose cases were submitted to the jury. Defendant La Fante, the fifth defendant, acquitted on Count 1 at an earlier trial, had been acquitted on Count 2, the conspiracy count, by direction when the Government rested in the present trial. The four remaining defendants have now moved (a) to set aside the verdicts and dismiss the indictment, (b) to set aside the verdicts and enter judgments of acquittal, Rule 29(c), and (c) for a new trial on the ground that one is required in the interests of justice, Rule 33.

The first trial of the two counts, in May 1961, ended in disagreement; the second trial resulted in June 1961 in convictions of the four moving defendants on both counts and of La Fante on Count 2 only; the convictions were reversed in July 1962, 305 F.2d 534; the third trial, taking place in May 1963, ended in a mistrial as to the defendants Persico, Albanese and Spero, and in a disagreement as to defendants McIntosh and La Fante; the fourth trial, conducted in January-April 1964, resulted in the conviction of the moving defendants on Counts 1 and 2 and of defendant La Fante on Count 2; the convictions were reversed in July 1965, 349 F.2d 6, and the case was remanded for a new trial. The fifth trial commenced on April 3, 1968, and the verdicts were returned on May 9, 1968.

The defendants moved before trial to dismiss the indictment on the ground of the Government's failure to accord them a speedy trial and its failure duly and timely to prosecute the case, and on the grounds that further prosecution would put them in double jeopardy and would violate their rights to due process through oppressive re-trial; and they moved also that this Court enter an order barring further prosecution in the interest of justice; defendants moved to dismiss also on the ground that to subject the defendants to a fifth trial would constitute cruel and unusual punish-

ment. The motion was denied with leave to renew it at trial. The Court noted that, although the first six months of delay was due to governmental indecision, responsibility for the rest of the delay was not clearly assessable, both sides had acquiesced in repeated calendar postponments, defendants never moved for a speedy trial, and defendants showed no loss of witnesses or change in available evidence after the reversal and remand for a new trial that would make the trial more difficult. The Court appeared to condition the right to effective renewal of the motion on a showing of loss of witnesses or of available evidence after remand. The test that will be applied, however, will not be so limited; it cannot be supposed that the mandate of the Court of Appeals was so much an unconditional and affirmative direction to conduct a new trial as it was a refusal to dismiss the indictment as an incident to reversing the judgment, leaving to the trial court the question of the propriety of a new trial in the circumstances shown to exist when the case was moved for trial. The Court of Appeals dealt with a record that closed with the verdict of April 24, 1964, and the sentences of June 19, 1964.

The principal contentions made on the motions revolve around the "surprize" calling of Joseph Valachi as a witness, the effect on the fairness of the trial of the large-scale publicity that followed, the admission through Valachi of prejudicial testimony picturing certain of the defendants as engaged deeply in hijacking and integrated in a Cosa Nostra "family," the allegedly fatal unfairness to the other defendants, by the rule of *United States* v. *Bruton*, 1968, 391 U.S. 123, that followed from Valachi's testimony against Albanese and Persico, and the unfair curtailment, by the rule of *Smith* v. *Illinois*, 1968, 390 U.S. 129, of the cross-examination of Vaccaro and Cancelli. Other points, less general in their application, are advanced by defendant

Spero. In addition the grand and petit juries are challenged as having been improperly selected.

The points now made were all canvassed thoroughly during trial and in the extended oral argument of the present motions, and elaborate treatment of them at this time cannot be useful, so long as the decision being made is clear.

The Government had the right to call Valachi as a witness if satisfied that he had relevant and competent testimony to offer, and if confident that it was not suborning perjury. If, as seems to be the case, it was the words of one of defense counsel spoken on January 6, 1964 (and not Valachi's senate sub-committee testimony), that first indicated to Government trial counsel that Valachi could testify to a Persico admission, then Government counsel were right to track the lead down. Having done so, through special agents, on October 11, 1967, their proper concern was to determine that what Valachi said was not a recent fabrication. No prior consistent statement was ever produced, and fabrication remained a lively suspicion to the end, given Valachi's background, his record and his determined negotiation of better living conditions as the price for his agreeing to testify.

At present there is no requirement that Government disclose its witnesses in advance of trial, although that is hardly a jewel in the crown of criminal justice, and it is inferentially condemned as less than fair by the statute that has long required the furnishing of a list of witnesses in capital cases. 18 U.S.C. § 3432; *cf. Gregory* v. *United States*, D.C. Cir. 1966, 369 F.2d 185, 187-189; Orfield, List of Witnesses and Jurors in Federal Criminal Cases, 1968, 44 F.R.D. 527. There is a general duty of fairness owed by all counsel when they make statements in open court in response to opposing counsel's requests. Government counsel spoke in open-ended terms of the witnesses that he might

call, but he did not disclose that he might well call Valachi, and it is very difficult to see how even a suspicious adversary could have anticipated that Valachi would be called.*

Government counsel's belief—well or ill-founded—that disclosure might imperil Valachi's security, explains the non-disclosure adequately enough; the delay allowed to enable the defense to prepare to attack Valachi's testimonial competency and to cross-examine him redressed the surprise amply. The argument that disclosure would have resulted in a different composition of the jury has no measurable legal content and is rejected. The weightier point is that disclosure would have made it possible to select a jury willing to be sequestered throughout the trial or to take other measures. In retrospect, the Court would have been well-advised to act on its own initiative by recommencing the trial with a sequestered jury when, late on April 4, it was asked to sign a writ for Valachi's production. Non-disclosure to defense counsel precluded their moving for such relief. No action was taken, and, partly in consequence, the publicity reached the jury.

The publicity was certainly, by legal standards, prejudicial matter. No doubt many judges would unhesitatingly have declared a mistrial, and would now set aside the verdict. Much depends here on the nature of the issue tried, the atmosphere of the trial, the nature of the publicity, and its apparent effect on the jury. The issue, despite the many trials, was concise, single and simple. The court room atmosphere while the jury was present was, on the whole, even and temperate throughout; substantially all of the sharp clashes between counsel occurred when the jury was absent. The publicity did not relate to guilt of the crime

* The statements in Persico's Point I on the present motion about the judge's knowledge of the intention to call Valachi are wrong in fact. The judge did not hear of Valachi until after the session of April 4.

for which defendants were on trial, but it did picture certain of them as criminals and may be supposed by supplying unsworn assertions of criminal propensity, to have been relevant and prejudicial. (An unfortunate slip, in no way traceable to Government counsel, had disclosed to the jury that one defendant had been in prison with Vaccaro before the Akers hijacking.) The jury's reaction to the publicity, if reliance is placed on the interrogation of them, was, if somewhat guardedly disclosed, not such as to convey the impression that the jurors would not fairly try the concise issue before them.

There is no factual basis for the argument that the defendants were already notorious and hence inevitably exposed to the sort of publicity that occurred in consequence of calling Valachi. That argument assumes that if the publicity is so damaging as to have jeopardized the fairness of the trial, it must nevertheless be tolerated if it is an inevitable concommittant of the public characters the defendants have created for themselves, and if it would be present in any trial of them at any place. Assuming the premise, the defendants bore no such public character. The jurors had never heard of them before trial.

The fairness issue must be decided within the four corners of the trial itself, and the impact of the publicity on the trial. On that basis it is concluded that the publicity did not destroy the fairness of the trial. No consideration has been given to the allocation of responsibility for the way in which the matter was handled on the day that Government counsel informed defense counsel that the next witness would be Valachi. Acting, as all participants were, under the confused pressures of the moment, it does not in retrospect appear that any participant acted in a way calculated to prevent, or to contain the effect of, the then anticipated publicity.

Counsel argue that not to set aside the verdict is "to place a confidence in the effect of curative instructions which is now constitutionally impermissible" under *United States* v. *Bruton*, 391 U.S. 123, 126-128, 137. But *Bruton* put its refusal to approve the constitutional adequacy of the limiting instructions there involved on the ground that such instructions are not an adequate substitute for the constitutional right to cross-examine one who has asserted that the defendant participated in the crime for which the confessing and accused men are standing trial together. The argument has no application to instructions the sole mission of which is to keep the focus of the jury's attention on the admissible evidence relevant to the issue of guilt. Such instructions are cognate to those given in every case in which prejudicial evidence is stricken and, more, in every case in which a defendant ex-convict testifies and is protected only by instructions on the limited effect to be given to his prior convictions. Indeed the instructions in such a case as the present one are easier to follow, and have a manifestly greater appeal to reason and fairness than instructions which permit the jury to consider prior convictions on the issue of credibility but not on the lurking issue of criminal propensity.

Valachi's testimony (Tr. 2759 *et seq.*, particularly Tr. 2780-2781, 2786-2793; 2951 *et seq.*; limiting instruction, Tr. 2948-2950) was that Albanese had told Valachi that he had participated in the Akers hijacking (Tr. 2786), and that by Albanese's own procurement, Albanese's wife had falsely testified at a 1961 trial (in order to discredit Vaccaro) that Vaccaro had made an indecent approach to her (Tr. 2788); he testified also that Persico in the presence of Albanese and McIntosh, implicitly stated that he had pulled the Akers hijacking for which he was then on trial (Tr. 2792). This directly relevant testimony came out embedded in a

broader recital that made the Akers hijacking one in a series; Persico was described as complaining that, under protest, he had been paying a "tax" on all of them to Profaci; Persico ("Junior") was portrayed as seeking the advice of Valachi as an elder statesman about the propriety of Profaci's tax (Tr. 2791-2793). Valachi did not bring up the supposed Gallo-Profaci war, or the murderous violence it allegedly involved. It is useless, again, to try to determine responsibility for the form the testimony took. All were aware of the shape it might take, and the courses pursued in this foreknowledge are plain on the record. There is great force in Government counsel's argument that in the immediate context of the present case the "other crime" and "criminal propensity" aspects of Valachi's recital were shorn of their usual objectionable nature because they accompanied directly relevant and damnatory evidence which if believed, rendered the remoter inference of probable guilt (from the reference to other crimes) meaningless and pointless. If Valachi was not believed on the directly relevant points, again, on the argument, the "other crimes" material will necessarily have altogether lost its prejudicial efficacy as inducing an unwarranted belief in the defendants' guilt of the main offense. And, in addition, the case for the relevancy and admissibility of all that Valachi said is far from slight; similar crime evidence has a place in the law; Vaccaro's testimony was alive with implications of a course of hijackings, and the Albanese and Persico admissions of repetitious involvement tended to corroborate Vaccaro generally by offering a background explanation for what otherwise seemed an over-elaborate and over-populated program for hijacking one Akers truck.

That Valachi's testimony was suspect, and manifestly so, appeared not only from its late appearance and the circumstances in which it became available, but from the very

grave doubt that the substance of it could have been (as Valachi intimated) disclosed to Agent Flynn when Valachi first began to cooperate, and not have been recorded somewhere by Agent Flynn, or in some form transmitted through Agent Flynn to the United States Attorney (Tr. 2860, 2908-2909, 2914-2915, 2964, 2965-2979, particularly 2977-2979). The countervailing factor relied on by Government counsel —that presumably informed defense counsel first alerted the Government trial counsel to the existence of a Persico admission in Valachi's memory—was not known to the jury. The Valachi testimony was violently attacked on all the available grounds; the value that the jury put on it is necessarily unknown.

Defendants claim that the principle of *Bruton* v. *United States* was transgressed by allowing Valachi to testify as to the Albanese and Persico admissions and by his testimony implicating the defendants in other hijackings. The point is particularly available to Spero and McIntosh who were not accused by Valachi but who may have suffered by Valachi's broad-brush testimony implicating McIntosh certainly in an appearance (along with Albanese) of subordination to Persico in the Profaci "family," and who may also have suffered (if Valachi was believed) by the corroboration of Vaccaro's testimony so far as it incriminated Persico and Albanese. Spero's counsel points out that *People* v. *Pilon,* 3rd Dept. 1968, 30 App. Div. 2d 365, applied *Bruton* broadly to require a reversal and severance essentially on the ground that limiting instructions do not protect a defendant against whose co-defendants much damaging evidence is admissible which does not reach the defendant seeking severance, particularly where the competency of evidence to corroborate certain accomplice evidence depended on the jury's first deciding that the alleged corroborating witness was not, rather, a second accomplice.

No doubt much will flow from *Bruton* in the consideration of pre-trial motions for severance. But the Court in *Bruton,* 391 U.S. at 133-134 and footnote 10, 135 does not hold nor does it imply that joint trials are at an end wherever there is a confession; the point is not to infringe a non-confessing co-defendant's right of confronting his accuser, and in this case the admissions did not accuse co-defendants. Valachi's testimony, if believed, certainly showed Albanese and McIntosh acting as subordinates to Persico and treating Valachi as a competent adviser. That testimony was, however, directly descriptive of the observed acts of Albanese and McIntosh and Valachi could be fully cross-examined about what he saw and what obedience to Persico's command he observed; the testimony did not relay to the jury words of a non-testifying Persico that accused Albanese and McIntosh of complicity in the crime.

The *Bruton* point, at its strongest when made by Spero, had no validity when made by McIntosh and Albanese. If they are not taken to have admitted complicity by their silence—and that was ruled out, without exception, in the instructions (Tr. 2948-2950, 4510-4512)—they were not accused by Persico and had no need to cross-examine him.

It is argued, under *Smith* v. *Illinois,* 1968, 390 U.S. 129, that defendants were denied the right to cross-examine Vaccaro and Cancelli because neither witness was required to state his residence or certain other background data. In each case the ruling was based on the conclusion that the witness was in fact in fear of reprisal, whether there was a foundation in fact for his fear or not. *Smith* v. *Illinois* did not present that situation, and Mr. Justice White, concurring, expressed his understanding of the Court's opinion as not inconsistent with his view that the rule of *Smith* v. *Illinois* does not warrant questions that merely harass, annoy or humiliate the witness, or justify inquiries which

tend to endanger the personal safety of the witness. Here, the witnesses came forward with reasons for being excused from answering the questions. Moreover, Vaccaro was a witness for the fifth time and evidently known to the defendants. Cancelli was a witness for the second time and he was evidently known to defendant Spero. In the total circumstances *Smith* v. *Illinois* did not require answers to the background questions and the total circumstances indicate that the questions were not pressed in aid of effective cross-examination.

Much is made of the excusing of Juror No. 1 during trial, after hearing, and on a ground that would appear to be entirely proper. *United States* v. *Zambito,* 4th Cir. 1963, 315 F.2d 266, 269; *cf. United States* v. *Ellenbogen,* 2d Cir. 1966, 365 F.2d 982, 989; *United States* v. *Houlihan,* 2d Cir. 1964, 332 F.2d 8, 12-13; *United States* v. *Goldberg,* 3rd Cir. 1964, 330 F.2d 30, 42-43; *United States* v. *Gottfried,* 2d Cir. 1948, 165 F.2d 360, 365. The hearing produced no remotely credible suggestion of prejudice, and the extent and extravagance of the statements made went so far beyond the bounds of reasonable advocacy as to throw doubt on the extent to which reliance could be placed on counsel's elaborate arguments in other contexts. The excusing of the jurors and the substitution of alternates was without incident. Tr. 3988-3992.

The challenges to the selection of the grand and petit juries must fail on the facts. There can be no finding, on the evidence presented, of systematic exclusion of any definable class, or systematic over-representation of any definable class, or of an evident departure from the standards of 28 U.S.C. § 1861. The testimony, rather, indicated a responsible and unbiased effort directed solely to choosing persons who could be expected to render the "efficient jury service" visualized by Section 1861. Paying attention to

years of schooling, job stability, and job responsibility is not concentrating on irrelevant juror characteristics as a means of imparting an impermissible bias to the jury list (as in *Rabinowitz* v. *United States*, 5th Cir. 1966, 366 F.2d 34, *cf. United States* v. *Henderson*, 7th Cir. 1962, 298 F.2d 522), nor can it be shown to impart an income-level, racial, or geographic bias to the jury list, or a social-class bias.

Merging of the grand and petit jury lists, both originally drawn from the voter registration lists, resulted in the appearance of many persons in the panel who had served on grand juries once or repeatedly. That service did not disqualify them. However, since defense counsel appear rather generally to challenge grand jurors *qua* grand jurors, and the experience of working with the merged list was new to defense counsel, additional challenges were allowed for use against those who had grand jury service so as to leave the defendants free to use their base challenges against the others called into the box.

The cumulative effect of the trial, its difficulties, its interruptions and skirmishings is extremely difficult to assess for that overall fairness which, as the Court of Appeals has indicated, is peculiarly required in this case (305 F.2d at 536). It would be easy enough to say that while no one ground of objection is sufficient, the aggregate have a sufficient synergic effect to require setting the verdict aside. Yet it is very hard at the end to efface a sense that defense counsel often courted unfairness, and dilated on even slight episodes with every trope in the advocate's repertoire as a means of creating a cumulative impression that the trial was breaking down, that the scene was being inundated in unfairness. Yet recollection and consideration of what went on before and with the jury does not bear that out. The publicity alone presents the genuine fairness issue so far as concerns matter not part of the trial evidence.

Nevertheless, the elements of basic unfairness were present in the fearful terms on which Vaccaro's evidence was obtained, and in the unlovely bargaining with Valachi for his testimony. Courts are far too reluctant to face the implications of governmental use of the testimony of "cooperative" co-defendants and kindred testimony; it may reflect an unarticulated conviction that the entire fifth amendment, confrontation, burden-of-proof and presumption-of-innocence syndrome is so far displaced from the range of contemporary analyses of the sociological frame of reference of common crime and the role of "penology" that the constitutional imperatives of criminal procedure must be compensated for by these otherwise intolerable compromises. There is more than a disturbing doubt, too, that Gehring's possibly very important testimony about the location of the "straight job" on the critical morning was not fairly presented. (Tr. 3725, 3727, 3732-3733, 3734, 3735, 3755, 3756, 3757, 3775, 3781-3792). The Government's summation, powerful, well organized and presented with great force, needlessly transgressed allowable limits at several points [Tr. 4366, 4386 (failure of defendants to contradict Vaccaro's testimony), 4443-4446, 4468, 4470-4472]. Yet the dubious circumstances of the presentation of the Gehring evidence became in at least one sense immaterial since the prior trial testimony was in the end received as such on the ground that Gehring was, as to that part of his evidence, unavailable through collapse of recollection. The charge was generally acceptable to both sides and appeared to present the issues to the jury in a proper way (except, perhaps, as to Tr. 4515, see Tr. 4528-4530). The jury, left with all the evidence and argument, had nothing of substance to marshal against the Government's elaborated evidence. The jury's task was to weigh that evidence for its probative force, and it was found sufficient. That result

is unchallengeable purely as a matter of evaluating formally sufficient evidence. The detail and circumstantiality of the Government's evidence have predictably turned out to require something more than attacks on credibility, no matter how forceful. The nature of the Government's proofs multiplied points of possible contradiction, yet nothing of substance was brought forward.

The final question, then, is whether even if the verdict may not be set aside on the basis of matters intrinsic to the trial and its immediate setting, the indictment must be dismissed in the light of the trial considered in its entirety on the grounds urged before Judge Weinstein and reserved by him for reconsideration at trial time. The specific circumstances of disadvantage which defendants advance as related to delay are not impressive. A dubiously useful witness called by Albanese at earlier trials died in December 1967, and it is said, although not very persuasively, that the death made it hopeless*—in the face of Valachi's new testimony—to press the defense that Vaccaro was motivated in his testimony by a wish to revenge himself on Albanese. Possible witnesses, disclosed in an FBI memorandum, to the time when the hijacked truck was first observed standing empty on the street had disappeared, but the memorandum itself was received in evidence. Gehring's failure of recollection between 1964 and 1968 impaired counsel's opportunity to cross-examine him in the most effective manner. The trial related to an episode that had occurred nearly nine years earlier. After four trials within the three year period May 1961 to April 1964, the fifth trial was not commenced until over four years after the last preceding trial commenced. Testimony, in such a setting

* Defense counsel argues that use of the dead man's testimony as given in a prior trial would be an inadequate means of matching the dead man's credibility against Valachi's *viva voce* testimony.

is arguably a feat in recalling earlier testimony rather than the facts; consistency not truth arguably becomes the testimonial goal.

After remand, nothing occurred in the case for six months. After some desultory proceedings in January, on one date in March, and on three dates in April 1966, again nothing occurred until June 2, 1967. Starting in June 1967 a number of matters relating to bail and the assignment of counsel were dealt with and the case was put over until September 1967. Again in September 1967 matters relating to the assignment of counsel and to bail came up, the trial was twice postponed, and on October 9, 1967, it was marked ready and passed. On October 26, 1967, the first motion to dismiss was filed. The delay from that date until the trial commenced cannot be considered to any degree avoidable, given the fact that there were five separately represented defendants, all busy in the Courts, two of them new to the case, and two of them assigned counsel. The critical time lapses after affirmance were not justified and were not occasioned by acts of the defendants. Their result has been that a case in which the statute of limitations would have expired in 1964 was tried, and for the fifth time, nearly four years later, in 1968.

The salutary principle of *United States* v. *Tateo,* 1964, 377 U.S. 463, 466, that the governmental right of re-trial serves the interests of society and of defendants by assuring rigorous review of trials on defendants' appeals without putting the guilty beyond reach of conviction at a fair retrial if an earlier trial fails for a defect in the manner in which it is conducted, must acknowledge some outer limit dictated by due process fairness; so too, some due process limit must be recognized as hedging in the governmental right to suffer so long as it does not procure delay in criminal retrial (*cf. United States* v. *Ewell,* 1966, 383 U.S.

116); *Pollard* v. *United States*, 1957, 352 U.S. 354, does not establish an affirmative principle that the speedy trial requirement is not transgressed, in the absence of defense insistence on prompt retrial, unless it can be shown that there is governmental delay that is "purposeful or oppressive." The double jeopardy and speedy trial rights are certainly limited by the societal interest in fair and workable law enforcement and prosecutorial procedures.

It is concluded that the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberateness in seeking retrial. *Cf. Ross* v. *United States*, D.C. Cir. 1965, 349 F.2d 210; *Hardy* v. *United States*, D.C. Cir. 1967, 381 F.2d 941, 948 fn. 35; *United States* v. *Parrott*, D.C.D. 1965, 248 F.Supp. 196. Note *Petition of Provoo*, D.Md. 1954, 17 F.R.D. 184, aff'd, 1955, 350 U.S. 857. It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process.

On these grounds it is concluded that Counts 1 and 2 of the indictment must be dismissed by appropriate order as to the moving defendants.

Brooklyn, New York
October 11, 1968.

JOHN F. DOOLING, JR.
U.S.D.J.

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 311—September Term, 1968.

(Argued December 20, 1968 Decided January 21, 1969.)

Docket No. 33019

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HONORABLE JOHN F. DOOLING, JR., United States District Judge for the Eastern District of New York,

Respondent.

UNITED STATES OF AMERICA,

—v.—

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, HUGH MCINTOSH,

Defendants.

E. D. N. Y. 60 Cr. 147

Before:

LUMBARD, *Chief Judge,*
MOORE, *Circuit Judge* and RYAN, *District Judge.**

Petition by the Government for a writ of mandamus directing the United States District Court for the Eastern

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* Sitting by designation.

District of New York, John F. Dooling, Jr., *J.*, to sentence defendants and enter judgment upon guilty verdicts returned by a jury on May 9, 1968. Judge Dooling had distributed to the parties a proposed memorandum and order dismissing the indictment on the ground that the four previous trials of the defendants, together with the "merely marginal fairness" of this fifth trial, violated due process. The Court of Appeals, Lumbard, *Chief Judge,* issued the writ, holding that a district court judge does not have the power to dismiss an indictment after the return of a verdict of guilty upon grounds which were in part considered and rejected without leave to renew before trial by another district judge.

Writ issued.

VICTOR C. WOERHEIDE and ROBERT M. ORNSTEIN, Department of Justice, *for petitioner.*

MAURICE EDELBAUM, *for defendant Persico.*
ROBERT KASANOF, *for defendant Albanese.*
FRANCES T. WOLFF, *for defendant Spero.*
EDMUND A. ROSNER, *for defendant McIntosh.*

LUMBARD, *Chief Judge*:

The government's petition for a writ of mandamus and/or prohibition raises the novel question whether a district judge has the power to dismiss an indictment, after a jury has returned a verdict of guilty, on the ground that there has been a "transgression of due process," even though the trial itself was fair and the evidence supports the verdict.

We find that the district judge lacks the power to dismiss the indictment for the reasons he has given. In the exercise of our supervisory power over the administration of justice we grant the petition and direct that sentences be imposed and that judgment be entered upon the verdict of the jury.

Consideration of the government's application requires examination of Judge Dooling's intended action in the light of the lengthy history of this prosecution, including the conduct of this latest trial.

The four defendants involved in this proceeding—Carmine Persico, Salvatore Albanese, Ralph Spero, and Hugh McIntosh—were indicted in April 1960 for conspiracy to hijack and for hijacking a truck transporting goods in interstate commerce in violation of 18 U.S.C. § 1951. To date there have been five trials based on this indictment. The first trial, in May 1961, ended in a jury disagreement. A second trial followed immediately and in June 1961 the four present defendants were convicted on both counts.[1] We reversed those convictions in July 1962 because of errors at trial. 305 F. 2d 534. The third trial the following spring of 1963 was aborted by mistrial as to Persico, Albanese, and Spero, after eight days of trial, and by a second hung jury as to the other defendants. The fourth trial lasted from January to April 1964 and resulted in the conviction of all defendants. The appeal was argued in March 1965; after reviewing the record of 9,595 pages we reversed again in July 1965, 349 F. 2d 6, because of errors in the trial judge's charge and remanded for a new trial.

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[1] One Magnasco was convicted on both counts, but was shot and killed prior to sentence. A co-defendant LaFante was convicted on the conspiracy count only. At the conclusion of the government's case in April-May 1968 trial Judge Dooling directed LaFante's acquittal for lack of sufficient evidence.

Prior to the fifth trial the defendants moved to dismiss the indictment on the grounds that the repeated trials, and the delay in prosecution of two and one-half years following our reversal in July 1965 of the fourth trial's verdict, seriously prejudiced defendants, violated their right to a speedy trial, and constituted cruel and unusual punishment. Judge Weinstein, upon full argument by both sides, denied the motion. He pointed out that the government alone was responsible only for six months of the delay occurring after our reversal, and that at no time since this date had defendants made a definite motion for a speedy trial. See *United States* v. *Lustman,* 258 F. 2d 475, 478 (2d Cir.), cert. denied 358 U.S. 880 (1958); *United States* v. *Kaufman,* 311 F. 2d 695, 698 (2d Cir. 1963). Defendants also had made no suggestion that their trial burden had become more difficult because of the loss of any evidence or witnesses since July 1965. In the absence of a showing of prejudice because of the delay and repeated retrials Judge Weinstein permitted the fifth trial to proceed, but granted defendants the right to renew their motion "at the trial" if "on the retrial of the case, it should appear that there was such prejudice. . . ."

The fifth trial commenced before Judge Dooling, in April 1968. The motions made before Judge Weinstein were renewed by defense counsel before trial commenced, at the close of the government's case, and at the close of the case before the charge to the jury. On each occasion Judge Dooling denied the motions. Transcript pp. 199, 371, 4195.

Throughout this period Judge Dooling was fully informed of those respects in which defendants claimed that they had been prejudiced by the delays and repeated mistrials, and he seems to have remained consistently unimpressed by these arguments.

Verdicts of guilty were returned by the jury on May 9, 1968. On June 24, 1968, the defendants jointly moved for alternative relief: (A) to set aside the verdict and dismiss the indictment; (B) for entry of judgment of acquittal as to each and all, and (C) for an order granting a new trial. The motion papers set forth 17 reasons why relief should be granted; 13 of these referred to alleged errors regarding evidence at the trial and the conduct of the prosecutor.

Judge Dooling reserved decision on these motions, and there was no further action taken on the case until October 11, 1968. On that date the Judge distributed to all parties copies of a memorandum and order which he intended to enter dismissing the indictment. He indicated that he would not file the order, however, in order to allow government counsel an opportunity to suggest modifications in the form of the memorandum which would allow the government to appeal from his action. The government chose to seek mandamus from this court ordering Judge Dooling to enter judgment on the verdicts and impose sentence. Judge Dooling entered no appearance in these mandamus proceedings, but the legality of his order was urged by counsel for all four defendants in briefs and oral argument.

We turn first to the propriety of Judge Dooling's proposed action.

The bulk of the memorandum before us carefully analyzes a variety of objections raised by the defense concerning the conduct of the trial. The most serious of these revolves around the appearance of the well known Mafia informer Joseph Valachi as a prosecution witness. Valachi had not testified at any of the four previous trials, and the defense was not informed of his appearance in this trial until shortly before he was called. While defense counsel objected to this element of surprise, and also to the admis-

sion of portions of Valachi's testimony, their major emphasis in the post-verdict arguments was on the prejudicial publicity which was occasioned by Valachi's appearance and which reached the jurors through the newspapers. In his opinion Judge Dooling manifests considerable concern over his own handling of this matter; in retrospect he states the view that "the Court would have been well-advised" to begin the trial anew after the Valachi episode with a sequestered jury.

Despite his doubt, Judge Dooling concludes that the Valachi testimony "did not destroy the fairness of the trial." He also rejects each and every one of the defendants' other arguments centering on alleged defects in the trial. He finds that the verdicts were supported by sufficient evidence.

Despite finding no ground upon which the jury verdicts can be set aside the court then goes on to consider the motions made before Judge Weinstein relating to the possible prejudice arising from the retrials and the delay before the fifth trial. He finds that "the specific circumstances of disadvantage which defendants advance as related to delay are not impressive." But this observation does not, as one might expect, end the case. Judge Dooling goes on to consider the arguments concerning delay and retrial which did not turn upon a specific showing of prejudice, and which Judge Weinstein had rejected before trial without leave to renew. Reviewing the exact same facts previously passed upon by Judge Weinstein the court finds that the "critical time lapses" occurring before the fifth trial "were not justified and were not occasioned by acts of the defendants." The court then states its holding:

> "It is concluded that the history of the present case through the date of verdict in the fifth trial, including

> the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the government rights of retrial and orderly deliberations (sic)* in seeking retrial. . . . [cases cited] It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process."

It is apparent from the court's memorandum that the proposed dismissal of the indictment is not based on the powers conferred on the district courts by the Federal Rules of Criminal Procedure. The court relies on none of the Rules in its memorandum, and its findings of fact and law, the correctness of which is not now before us, indicate its belief that the Rules do not sanction its proposed action. The only Rule which conceivably could be read as authorizing the dismissal of an indictment under the present circumstances is Rule 48(b):

> "If . . . there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint."

The Rule implements the right to a speedy trial guaranteed by the Sixth Amendment. *Pollard* v. *United States*, 352 U. S. 354, 361 n. 7 (1957); *Fleming* v. *United States*, 378 F. 2d 502, 503 n. 3 (1st Cir. 1967). It seems doubtful that this Rule contemplates the dismissal of an indictment after the conclusion of a trial and the return of verdicts of guilty, but there is no need to resolve this question for present purposes. There is no doubt that before Rule 48(b) can be

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* "Deliberateness", in Judge Dooling's memorandum.

invoked there must be a showing that the delay prejudiced the defendant's ability to rebut the government's case, or that the delay was caused by oppressive governmental action. See, *e.g.*, *Fleming* v. *United States*, 378 F. 2d 502, 504 (1st Cir. 1967); *United States* v. *Bennett*, 364 F. 2d 499, 500 (2d Cir.), cert. denied 386 U. S. 917 (1966); *United States* v. *Sanchez*, 361 F. 2d 824, 825 (2d Cir. 1966); *United States ex rel. Von Çseh* v. *Fay*, 313 F. 2d 620, 624 (2d Cir. 1963). In his memorandum Judge Dooling specifically finds that the claims of prejudice by the defendants are "unimpressive," and impliedly holds that the delay was not "purposeful or oppressive." These facts, together with his affirmative statement that his action is taken on "due process" grounds, demonstrates that Judge Dooling does not regard Rule 48(b) as authorizing the dismissal of this indictment.

It is equally clear that Judge Dooling does not propose to act under Rule 29 or Rule 33, both of which allow a trial judge to set aside a verdict of guilty. Rule 29 authorizes this action, together with the entry of a judgment of acquittal or the ordering of a new trial, only when the evidence is insufficient to support the verdict, a finding which Judge Dooling rejects in his opinion. Rule 33 empowers the court to order a new trial "if required in the interest of justice." Judge Dooling found that the trial of the defendants was fair, although from his opinion it is evident that he has entertained some doubts on this score. We must read his proposed memorandum and order, which would dismiss the indictment rather than order a new trial as allowed by Rule 33, as a denial of the defendants' motion for a new trial.

Since the Federal Rules provide no basis for the court's proposed action it must find its justification, if any, in the inherent power of a district court "to do justice."

United States v. *Apex Distributing Co.*, 270 F. 2d 747, 756 (9th Cir. 1959); *O'Neal* v. *United States*, 272 F. 2d 412, 413-14 (5th Cir. 1959); see *United States* v. *Heath*, 260 F. 2d 623, 632 (9th Cir. 1958); *United States* v. *Kane*, 243 F. Supp. 746, 752 (S.D.N.Y. 1965). But whatever may be the scope of this power, in our view the proposed action of the court is not supported by any findings made in its memorandum, but rather only by conclusions stated in general terms.

In final analysis his conclusion is not based on any ruling regarding the matters left open by Judge Weinstein, but rather, it would seem, upon the court's own sense of uneasiness because of doubt that the trial has been fair. In such event the proper course for the trial judge would have been to confess his own errors and grant a new trial: it does not lie in his power to put an end to the case by dismissal because of vague and unsubstantiated doubts. The proposed action is without precedent, and we believe it would seriously disrupt the prompt and efficient administration of criminal justice.

The court cites four cases as analogous support for its proposed order dismissing the indictment, but they have little relevance. In *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965), and *Petition of Provoo*, 17 F.R.D. 184 (D. Md. 1954), aff'd 350 U.S. 857 (1955), the district courts dismissed indictments *before* trial had begun, and upon showings that the defendants had been prejudiced by the delays in prosecution. The holding of the Court of Appeals in *Ross* v. *United States*, 349 F. 2d 210, 215 (D.C. Cir. 1965), reversing a conviction in the exercise of its supervisory power over the district courts, also was based on a finding of prejudice. See *Hardy* v. *United States*, 381 F. 2d 941, 943 (D.C. Cir. 1967).

Rule 12(b)(2) of the Federal Rules provides:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information . . . may be raised only by motion before trial. . . ."

The defendants did make their motions in a timely manner before Judge Weinstein. Rule 12(4) governed the disposition of the motions by Judge Weinstein:

> "A Motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."

The evident purpose of these two provisions of Rule 12(b) is to encourage the disposition before trial of as many motions as possible which challenge the right of the government to continue a prosecution. Obviously this practice is greatly preferable to considering such a motion only after the completion of a lengthy trial. But Rule 12(b)(4) recognizes that occasionally a decision must be postponed until trial, since the merits of the motion may depend on facts which will not be developed until witnesses are called and evidence is introduced. Thus Judge Weinstein, while denying the motions for dismissal before trial, acknowledged the possibility that events at trial might reveal that the delay in prosecution had indeed prejudiced the defense, even though no prejudice was apparent on the record before him. He therefore granted defendants leave to renew their motions at the trial if, and only if, "on the retrial of the case, it should appear that there was such prejudice." Except as revived by such a showing of prejudice the defendants' motions to dismiss the indictments were "determined before trial," and could not thereafter be entertained by a

district judge without doing violence to the interests of judicial economy furthered by Rule 12(b)(2) and (4).

Yet this is just the action threatened by the memorandum and order before us. The claims of prejudice through delay are still found to be "unimpressive," yet the motions to dismiss the indictment are about to be granted on the grounds rejected, without leave to renew, by Judge Weinstein before trial. This dismissal, after a five week trial during which no right of the defendants is found to have been violated, would result in a shocking waste of jury and court effort. Judge Dooling had ample discretion to take appropriate action *during the trial* to protect the rights of the defendants, including their right not to suffer serious prejudice because of the delays and the number of retrials which have occurred over the course of this prosecution. And, of course, upon appeals from convictions this court will review the propriety of Judge Weinstein's original ruling, Judge Dooling's ruling that events at the trial did not demonstrate that defendants had been seriously prejudiced by the delays before trial, and any other rulings which denied properly preserved objections to the conduct of the trial itself. The existence of these avenues of redress for the defendants eliminates any need for the existence of a power in the trial court to dismiss an indictment, after the return of guilty verdicts, on grounds rejected before trial. The exercise of such a power by a district judge would interfere seriously with the proper prosecution of criminal cases in the federal courts.

We think the remedy for the proposed dismissal of the indictment by the district judge which we have found to be beyond his power is to issue the writ of mandamus prayed for by the government and direct the district judge to proceed to sentence the defendants and enter judgment on the verdict of the jury.

Mandamus is an extraordinary remedy, and is appropriate only where there are "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Will* v. *United States*, 389 U.S. 90, 95 (1967). Its use in aid of the lawful rights of the government in the prosecution of criminal cases is well established. See *United States* v. *Smith*, 331 U.S. 469 (1947); *Ex Parte United States*, 287 U.S. 241 (1932); *Ex Parte United States*, 242 U.S. 27 (1916); *United States* v. *Mayer*, 235 U.S. 55 (1914). The fact that Judge Dooling has not formally filed his memorandum and order does not render the government's application for mandamus premature. See *United States* v. *Mayer*, 235 U.S. 55, 57 (1914); cf. *Will* v. *United States*, 389 U.S. 90, 93 (1967).

We will not pause to determine whether, if Judge Dooling entered his proposed order, the government would be able to appeal his determination under 18 U.S.C. § 3731 (1964). Even if it were clear that the government could not appeal the government's argument for mandamus would not be made more compelling, for mandamus may not do service for an appeal which has been barred by the Congress. *Will* v. *United States*, 389 U.S. 90, 97 (1967). We think it equally true that the fact that the government may have no right of appeal does not act as a conclusive bar to the issuance of mandamus in its favor. Certainly the restrictions placed upon the government's right to appeal do reflect important policy judgments by Congress, at their core protecting the right against double jeopardy, which must not be undermined by casual resort to mandamus. But circumstances can arise which present a compelling need for the issuance of mandamus in order to further important countervailing interests. Here we find this need in our responsibility for preventing gross disruption in the

administration of criminal justice, and we act pursuant to our supervisory power over the district courts. Cf. *United States* v. *Bryan*, 393 F. 2d 90 (2d Cir. 1968). The Supreme Court, in affirming the issuance of a writ of mandamus by the Court of Appeals for the Seventh Circuit, expressed in the clearest terms its support for the power we now exercise:

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 259-60 (1957).

Accordingly, we hold that in the circumstances of this case the fact that the government might not have been able to appeal from Judge Dooling's order does not render mandamus inappropriate. See *United States* v. *Igoe*, 331 F. 2d 766, 769 (7th Cir. 1964). To the extent that the dictum in *United States* v. *Bondy*, 171 F. 2d 642, 643-44 (2d Cir. 1948), suggests a different result we do not adopt it.

We are convinced that it is so highly improper and undesirable for a district judge to take the action which is here proposed by Judge Dooling that we find present the "extraordinary circumstances" which require and justify the exercise of our power to issue the writ of mandamus. For us to acquiesce in this unprecedented action would be to encourage the use of similar procedures by the district courts in the future. Since we believe that the dismissal of an indictment after a verdict of guilty, upon grounds examined and found deficient before trial, is highly deleterious to the sound administration of criminal justice, it is important that we make a clear and unequivocal response to the first example of such a dismissal to come before us. Cf. *Schlagenhauf* v. *Holder*, 379 U. S. 104, 110 (1964).

We are also of the view that the exercise of our man-

damus power is especially appropriate in a case which has already taken a grossly disproportionate amount of trial time in the United States judicial district where the delay in reaching criminal cases for trial is the greatest of any district in the country.[2] See Administrative Office of the United States Courts, Annual Report of the Director—1968, Table D 3b.

We issue the writ of mandamus, and direct the district judge to sentence the defendants and enter judgment on the verdicts of the jury. Judge Dooling remains free to make such further findings as might aid this court in its eventual review of the convictions of these defendants.

Nothing we have said is to be construed as expressing an opinion on the merits of any of the contentions made by a party which may be relevant upon appeals from the convictions.

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[2] In fairness to the district judges it should be pointed out that two unfilled vacancies in the court for a period of two years prior to the summer of 1968 are the principal reason for the delays in criminal trials. Recent efforts of the judges, under Chief Judge Zavatt, including summer sittings by the active and senior judges, and by visiting judges, have greatly reduced the number of pending indictments and the time intervals before trial.

APPENDIX C

The Memorandum and Order of Judge Weinstein

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

60 CR 147

UNITED STATES OF AMERICA,

Plaintiff,

—against—

CARMINE PERSICO, JR., SALVATORE ALBANESE, RALPH SPERO, and GEORGE LAFANTE,

Defendants.

Appearances:

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WEINSTEIN, D. J.

Appendix C—The Memorandum and Order of Judge Weinstein

This case has been repeatedly tried. The last convictions of defendants was reversed by the Court of Appeals in July, 1965. See *United States* v. *Persico,* 349 F. 2d 6 (2d Cir. 1965). A retrial following that reversal is now scheduled for January of 1968. Defendants move to dismiss on the ground that the long delay and repeated trials have seriously prejudiced them and constitute, in effect, cruel and unusual punishment.

Counsel for defendant LaFante points out that on the last appeal he forcefully argued that there should be no retrial in view of previous delays and retrials and the heavy financial burden of a new trial. This argument was rejected by the Court of Appeals which remanded the case for trial. Counsel now argue that the Court of Appeals was wrong in its decision. This is not a consideration calculated to convince a District Judge.

The delay from July of 1965 to January of 1968 is disturbing. The first six months of it is concededly attributable to the government's indecision. Blame for the remainder of the delay is not clearly assessable. A large part of it was acquiesced in by the defendants and the government when the case repeatedly appeared on the calendar and was adjourned either on consent or without objection. At no time did the defendants make a definite motion for a speedy trial. Their plaint that the Sword of Damocles has been hanging over them for some seven years is not decisive since it could have been removed at any time during the last two and one-half years on their request.

No suggestion is made that since July, 1965, any loss of witnesses or any change in available evidence has made the trial more difficult. If, on the retrial of the case, it should

appear that there was such prejudice, the defendants may renew their motion.

The motion to dismiss is denied with leave to renew it at the trial.

So ordered.

Dated: Brooklyn, New York
December 13, 1967

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U. S. D. J.